IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1171

JAMES Y. CARTER, Public Vehicle License Commissioner of the City of Chicago,

Petitioner,

vs.

LUTHER MILLER, on his own behalf and on behalf of all others similarly situated,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF OF PETITIONER

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INDEX

PAGE

ARGUMENT:

I.

The Applicable Equal Protection Standard Is The Traditional Rational Relationship Test 1

II.

The Ordinance Is Rationally Related To Determining The Present Fitness Of Cab Drivers 4

CONCLUSION 11

AUTHORITIES CITED

Cases

Baxstrom v. Herold, 383 U.S. 107 (1966) 4
Examining Board v. Flores de Otero, 426 U.S. 572 (1976) 3
Frontiero v. Richardson, 411 U.S. 677 (1973) 3
Graham v. Richardson, 403 U.S. 365 (1971) 3
In re Griffiths, 413 U.S. 717 (1973) 3
James v. Strange, 407 U.S. 128 (1973) 3
Loving v. Virginia, 388 U.S. 1 (1967) 3
McLaughlin v. Florida, 379 U.S. 184 (1964) 3
Oyama v. California, 332 U.S. 633 (1948) 3
Rinaldi v. Yeager, 384 U.S. 305 (1966) 3
Roth v. Daley, 119 Ill. App. 2d 462, 256 N.E. 2d 166 (1970) 5
Sugarman v. Dougall, 413 U.S. 634 (1973) 3
United States v. Carolene Products Co., 304 U.S. 144 (1938) 2
Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 7

Statutes

Municipal Code of Chicago, Sections 103-12 and 103-13 .. 9

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ARGUMENT

I.

The Applicable Equal Protection Standard Is The Traditional Rational Relationship Test.

The Court of Appeals considered the question of which equal protection standard should be applied to the ordinance and concluded that it should be the rational

relationship test. In his concurring opinion Judge Campbell observed (App. pp. 28-33) that because no fundamental interest is affected and no suspect class involved that the more severe strict judicial scrutiny test requiring demonstration of a compelling governmental interest is not called for. Rather he declared that petitioner "need only establish that the classification is rationally related to a legitimate legislative purpose." (App. p. 31) In a note (App. p. 32) Judge Campbell also observed:

> Nor do I believe as plaintiff contends, that *Reed v. Reed*, 404 U.S. 71 (1971) created a new and more stringent equal protection standard in cases which do not require application of the strict scrutiny rule. *Reed* evidences no intention to deviate from the rationality standard, except perhaps in sex discrimination cases, which may well involve a "suspect class."

In this Court respondent appears to renew his suggestion that Chicago's ordinance requires application of a standard of review more stringent than the traditional rational relationship measure. He states that ex-offenders constitute a "discrete and insular minority". (Respondent's Brief, pp. 13-19) Such minorities, he continues, include those who "belonged to a politically vulnerable and/or traditionally disadvantaged group." Decisions of this Court are cited including *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), which noted "the special responsibility recognized long ago by this Court to scrutinize carefully laws directed against a 'discrete and insular' minority."

It is true that subsequent to the *Carolene Products Co.* decision this Court recognized several legislative classifications which it held subject to a more searching equal protection standard than the rational relationship

test. Such classifications have included those based on race, see *Loving v. Virginia*, 388 U.S. 1 (1967), and *McLaughlin v. Florida*, 379 U.S. 184 (1964); those based on alienage, see *Graham v. Richardson*, 403 U.S. 365 (1971), *Sugarman v. Dougall*, 413 U.S. 634 (1973), *In re Griffiths*, 413 U.S. 717 (1973) and *Examining Board v. Flores de Otero*, 426 U.S. 572 (1976); those based on ancestry or national origins, see *Oyama v. California*, 332 U.S. 633 (1948); and probably those based on sex, see *Frontiero v. Richardson*, 411 U.S. 677 (1973). These classifications have been called "suspect" and legislative enactments based upon them have been held subject not to the rational relationship standard but to the more rigorous "strict judicial scrutiny."

Neither ex-offenders nor any subgroup of ex-offenders have ever been held a suspect class. *James v. Strange*, 407 U.S. 128 (1973), prominently cited by respondent, held invalid a Kansas statute which denied to indigent criminal defendants basic protections against debt collection remedies statutorily available to all other debtors. In reaching its conclusion this Court did not hold criminal defendants or convicts to be a suspect class. Nor did it apply a strict scrutiny test or any other equal protection standard more searching than the traditional rational relationship test. The opinion holds only that the statute's discrimination against one group of debtors, indigent criminal defendants, was not rationally related to the statute's purpose—the recoupment of state funds. *Rinaldi v. Yeager*, 384 U.S. 305 (1966), similarly applied the rational relationship standard and found a statute requiring reimbursement to the state for transcripts for unsuccessful appellants confined in state institutions, but excusing reimbursement from those not confined, to result in an invidious discrimination.

It also is clear that this Court found the rational relationship test appropriate in *Baxstrom v. Herold*, 383 U.S. 107 (1966). The court there held invalid a statute which granted a hearing on the question of dangerous mental illness to all persons, including convicts, except those convicts who happened to be imprisoned at the time the determination was to be made. That distinction, the Court declared, removed "all semblance of rationality of the classification." 383 U.S. at 115.

None of the cases involving criminal defendants or ex-offenders have held such classifications to be "suspect" for equal protection purposes; nor have those cases applied any equal protection standard more stringent than simply requiring that the classification bear a rational relationship to a legitimate legislative purpose. On the other hand those cases cited by respondent in which a standard more stringent that the rational relationship test has been applied have been those in which a suspect class was affected and the test then applied has been strict judicial scrutiny. No third equal protection test has been announced or defined by this Court and the class of ex-offenders has not been identified by his Court as one for which peculiar equal protection solicitude is warranted. For these reasons it is submitted that the equal protection standard applicable to Chicago's ordinance is the traditional rational relationship test.

II.

The Ordinance Is Rationally Related To Determining The Present Fitness Of Cab Drivers.

In his original brief in this Court petitioner noted that the purpose of the ordinance is the advancement of public safety. The ordinance is premised upon the

legislative judgment that use of a deadly weapon to commit a crime evidences a peculiar propensity for violence and disregard for human life. The ordinance also recognizes that taxi passengers are uniquely vulnerable to violence at the hands of a taxi operator. Passengers are inevitably uninformed of the identity and character of their driver. Yet they must place themselves in an isolated, highly mobile vehicle where they are entirely dependent upon the will and disposition of the driver. Responsibility for their safety is a burden necessarily thrust upon the licensing authority.

The Court of Appeals did not question the purpose of the ordinance which it acknowledged to be public safety. (App. p. 21) That Court, however, held that the ordinance discriminates irrationally among the class of ex-offenders because it conclusively bars applicants with weapons convictions but provides for discretion in the matter of revocation of the licenses of incumbent licensees who have such convictions. Respondent in this Court has additionally emphasized a series of other equal protection objections to the ordinance, generally to the effect that the restrictions made by the ordinance are irrationally over- and under-inclusive and that they are not sufficiently focused upon the applicant's present fitness.

Respondent first suggests (Brief, pp. 25-26) that the ordinance has already been declared invalid on irrationality grounds in *Roth v. Daley*, 119 Ill. App. 2d 462, 256 N.E. 2d 166 (1970). Roth, an ambulance attendant-driver for twelve years and operator of an ambulance service for six years, was summarily denied renewal of his license. This was the result of an ordinance amendment which, for the first time, subjected ambulance drivers to the provision of ineligibility as a con-

sequence of convictions for commission of a crime with a deadly weapon. Roth's conviction, which antedated the beginning of his ambulance driving career by several years, had not been a barrier to his licensure prior to the amendment of the ordinance; after the amendment of the ordinance Roth was automatically denied the license without a hearing. The Appellate Court of Illinois held the ordinance invalid *as applied to Roth.*

In the circumstances of *Roth* the application of the new ordinance to an incumbent licensee resulted in a summary and automatic revocation of a license which Roth had exercised, apparently without fault, for a period of twelve years. The irrationality of this result is not continued under current application of the ordinance. Revocation of the license of incumbent public chauffeurs is, under the provisions of the ordinance, discretionary and can be effected only after a hearing. Indeed, it is as a result of the fact that petitioner does provide hearings for incumbents such as Roth that the Court of Appeals has now held the ordinance invalid.

In arguing that the ordinances' prohibitions are under-inclusive respondent observes that under the terms of the ordinance applicants having convictions for various offenses other than those involving use of a deadly weapon might, upon a favorable exercise of discretion, obtain a license as early as eight years after conviction. Thus he notes (Respondent's Brief, p. 31) that those convicted of "serious" offenses such as kidnapping, and automobile-related offenses including involuntary manslaughter and reckless homicide, unlike those convicted of crimes with deadly weapons, might eventually be eligible for a taxi driver's license.

It is perhaps true that kidnapping and some other crimes not enumerated by the ordinance as conclusive bars to licensure are offenses quite as anti-social as the

deadly weapons offenses which do permanently bar issuance of a license. If the purpose of the ordinance were to impose sanctions upon offenders or simply to protect the public from dishonest, careless or unskilled drivers these omissions would be serious defects in the ordinance. But the City has not sought through imposition of the conclusive bar against the specified ex-offenders to protect the public from all conceiveable dangers. Only the dangers posed by a violently disposed driver against a captive passenger were the target of this ordinance provision. And it can hardly be irrational to suppose that one who has been convicted of a crime with a deadly weapon is substantially more likely to be disposed toward such action than one who has committed other crimes, reprehensible or anti-social as they may have been.

In *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955) at 489, this Court stated:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner v. Texas*, 310 U.S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semlar v. Dental Examiners*, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A.F. of L. v. American Sash Co.*, 335 U.S. 538. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Plainly the principles stated by Justice Douglas in *Williamson* are applicable in this case. Unsafe drivers may pose a threat to public safety but the Equal Protection Clause should not be used to invalidate a

legislative measure which has focused directly and forcefully upon a different threat. The possibility of a violent crime being committed against a passenger by a cab driver convicted of an offense not specified in the ordinance as a permanent bar no doubt exists. If that possibility should materialize it is a problem which could then be legislatively addressed. But until and unless experience proves that danger to be acute it is not irrational to concentrate upon the most obvious danger—violence by those convicted of such crimes in the past.

A rather different argument of under-inclusiveness is made by respondent in his observation that the restrictions on public chauffeur licenses are more severe than on any other profession licensed by the City. (Respondent's Brief, pp. 37-39). Clearly the possible dangers posed by auto-repairmen, pool room operators, house-movers and the several other occupations listed by respondent is very different from that posed by cab drivers. As *Williamson, supra*, holds, the Equal Protection Clause does not require that dangers of all kinds and magnitudes be dealt with identically and simultaneously.

On the other hand, respondent also suggests several grounds upon which he concludes that the ordinance is invalid for over-inclusiveness. He argues that not all crimes committed with a deadly weapon are of such gravity that they warrant exclusion of the offender from cab driving. He also criticizes the inclusion of certain sexual and narcotics offenders among those prohibited from obtaining the license. Plainly differing aspects of the public safety problem underlie these several restrictions. Additionally it is not the "seriousness" of either deadly weapons crimes or of the other offenses which was critical to their inclusion in the ordinance. Rather,

it is the peculiar vulnerability of cab passengers to harm at the hands of a driver which caused weapons offenses to be included. Moreover, as respondent's complaint (App. pp. 3-8) readily demonstrates, his conviction was for armed robbery and he sought relief only from the provisions of the ordinance directed at those convicted of offenses involving the use of deadly weapons. This case has been argued and decided below exclusively on that issue and resolution of the issues which might be raised by other provisions of the ordinance should await another plaintiff and another legal action.

Respondent also contends (Brief, p. 35) that the ordinance is overbroad in applying not only to taxi drivers but also to ambulance and bus drivers for which occupations he argues that the restrictions of the ordinance are completely without justification. Respondent is incorrect in his assertion that bus drivers are regulated by the ordinance. By its own terms Chapter 28-1 excludes from the definition of public passenger vehicles (for which public chauffeur licenses are required) all Chicago Transit Authority and public utility drivers; thus bus drivers are not subject to the provisions of the ordinance. It is true that Sections 103-12 and 103-13 of the Municipal Code of Chicago which provide for the licensing of ambulance drivers incorporate the provisions of Section 28.1-3. However respondent did not apply for an ambulance driver's license and would not have been eligible to drive an ambulance on the basis of the license for which he did apply. Moreover, it is hardly irrational to conclude, as the City Council evidently did, that an ambulance patient is exposed to the same sort of danger as a cab passenger and accordingly requires the same sort of protection.

Respondent also has argued that although a policy of forbidding those recently convicted of certain offenses from driving cabs may be rational the ordinance here at issue is invalid as a result of the permanent barrier it raises against those convicted of crimes with deadly weapons. (Brief pp. 28-39). The ordinance, he argues, is irrational for its failure to take into account the likelihood of rehabilitation and to focus upon present fitness by conducting hearings. Rehabilitation has been recognized by the City as a high social priority and as a process to which the City can and does contribute in its own hiring policies and regulations as respondent admits. (Brief pp. 37-39) But in meeting its responsibility to protect the cab-using public the City has recognized that expertise in reliably predicting rehabilitation successes is not yet available. Judge Campbell observed in his concurring opinion (App. p. 32):

> "The past conduct of an applicant may be the best indicator of his present character and his future actions. As the *amicus curiae* brief filed in appellant's [Respondent's] behalf by the Chicago Council of Lawyers and the John Howard Association concedes, well over 60% of those arrested for the commission of crimes nationally are ex-offenders.

Plainly courts, parole boards and the criminal justice system generally, lack the ability to accurately identify rehabilitated and unrehabilitated ex-offenders. An ordinance which simply acknowledges this fact in the face of a sensitive area of regulation is not irrational.

Respondent suggests, however, that because the City has a system in place for judging the fitness of current licensees it should not be allowed to protest the inapplicability of that system to applicants. (Brief, pp. 40-42, 52). But in the case of applicants the petitioner would be compelled to predict rehabilitation; whereas

with licensees the task is primarily that of evaluating a history of the performance of cab-driving duties. The factors to be considered and the inferences which must be drawn are very different.

CONCLUSION

Both respondent and amici curiae contend that the ordinance is irrational on various grounds. Closely examined, however, their arguments do not demonstate the irrationality of the ordinance. It is not irrational to believe that a man's past behavior is the most reliable indicator of his future conduct. Nor is it unreasonable to enact legislation which acknowledges the fact that present rehabilitative efforts are only partially and unpredictably successful. It also is not unreasonable to consider actual job performance records of those already licensed, as is done in the case of incumbent licensees, rather than summarily revoking their licenses. This is a cautious policy but is not irrational.

For the reasons stated above it is respectfully requested that the judgment of the Court of Appeals be reversed and the judgment of the District Court be affirmed.

Respectfully submitted,

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